LIBRARY Supreme Court, U.S.
FILED
MAR 8 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1144

PAUL MILSTEIN, SEYMOUR MILSTEIN, GLORIA MILSTEIN FLANZER, and MORRIS MILSTEIN,
Petitioners,

v.

GAF CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS LOSS
Attorney for Petitioners
Langdell Hall
Cambridge, Massachusetts 02138

Of Counsel:

STROOCK & STROOCK & LAVAN
61 Broadway
New York, New York 10006

DAVID LUBART
CHARLES G. MOERDLER
GARY J. GREENBERG
STEPHEN A. BLOCK
ROBERT P. STEIN

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. The Williams Act	2
B. The Complaint	4
C. Petitioners' GAF Holdings	4
D. The Filings	4
E. The Decisions Below	5
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	15
APPENDIXES:	
A—Opinion of the Court of Appeals	1a
B—Opinion of the District Court	1b
C—Statutory Provisions Involved	1c

TABLE OF AUTHORITIES

PAGE

CASES:

Bath Industries, Inc. v. *Blot*, 427 F. 2d 97 (7th Cir.), *aff'g* 305 F. Supp. 526 (E. D. Wis.) ... 5, 6-7, 8, 12

J. I. Case Co. v. *Borak*, 377 U. S. 426 7

Ozark Air Lines v. *Cox*, 326 F. Supp. 1113 (E. D. Mo.) 6

SEC v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180 13

Sisak v. *Wings & Wheels Express, Inc.*, CCH Fed. Sec. L. Rep. ¶ 92,991 (S. D. N. Y.) 6

Superintendent of Insurance of the State of New York v. *Bankers Life & Casualty Co.*, 404 U. S. 6 14

United States v. *American Trucking Assns., Inc.*, 310 U. S. 534 10-11

United States v. *Dickerson*, 310 U. S. 554 10

STATUTES:

Securities Act of 1933:

15 U. S. C. § 77e(b) 14

15 U. S. C. § 77j 14

15 U. S. C. § 77k 14

15 U. S. C. § 77l(1) 14

15 U. S. C. § 77l(2) 14

Securities Exchange Act of 1934:

15 U. S. C. § 78m(d) ..... *passim*

15 U. S. C. § 78m(d)(1) 2, 6, 9, 11

15 U. S. C. § 78m(d)(1)(A) 9

PAGE

15 U. S. C. § 78m(d)(1)(B) 9
15 U. S. C. § 78m(d)(1)(C) 9
15 U. S. C. § 78m(d)(2) 3
15 U. S. C. § 78m(d)(3) 3, 6, 9
15 U. S. C. § 78m(d)(5) 3
15 U. S. C. § 78m(d)(5)(B) 3, 6
15 U. S. C. § 78m(e) 2
15 U. S. C. § 78n(d) 2
15 U. S. C. § 78n(d)(2) 3
15 U. S. C. § 78h(d)(8) 3
15 U. S. C. § 78n(d)(8)(B) 3
15 U. S. C. § 78n(e) 2
15 U. S. C. § 78n(f) 2
15 U. S. C. § 78p(a) 8–9
15 U. S. C. §78ff(a) 11, 13

28 U. S. C. § 1254 1

P. L. 91-567, 84 Stat. 1497 2

RULES:

Pursuant to the Securities Exchange Act of 1934:

17 C. F. R. § 240.10b 5 .....4, 5, 13
17 C. F. R. § 240.13d-1 3
17 C. F. R. § 240.14a-2(a) 12
17 C. F. R. § 240.14a-11(c) 5
17 C. F. R. § 240.14d-1 3

PAGE

LEGISLATIVE MATERIALS:

113 Cong. Rec. 24664 (1967) 2, 12

113 Cong. Rec. 24665 (1967) 12

Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids, Hearings before Subcom. on Securities, S. Com. on Banking & Currency, 90th Cong., 1st Sess. 10, 12

H. R. Rep. No. 1711, 90th Cong., 2d Sess. 10

S. Rep. No. 550, 90th Cong., 2d Sess. 10

TREATISES AND OTHER SECONDARY SOURCES:

Brudney, *A Note on Chilling Tender Offers*, 21 Rutgers L. Rev. 309 12

Fleischer and Mundheim, *Corporate Acquisitions by Tender Offer*, 115 U. Pa. L. Rev. 317 12

Hayes and Taussig, *Tactics of Cash Takeover Bids*, 45 Harv. Bus. Rev. 135 (Mar.-Apr. 1967) 12

6 Loss, *Securities Regulation* 3664 (1969 Supp.) 10

Symposium—Controlling Corporate Takeover Bids: State Regulation and the Ohio Approach, 21 Case W. Res. L. Rev. 605 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

PAUL MILSTEIN, SEYMOUR MILSTEIN, GLORIA MILSTEIN FLANZER, and MORRIS MILSTEIN,

Petitioners,

v.

GAF CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners pray that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit that reversed a judgment of the United States District Court for the Southern District of New York.

Opinions Below

The opinions of the Court of Appeals, not yet officially reported, and of the District Court, 324 F. Supp. 1062, are set out in Appendixes A and B.

Jurisdiction

The judgment of the Court of Appeals was entered on December 13, 1971. The jurisdiction of this Court is invoked under § 1254 of the Judicial Code, 28 U. S. C. § 1254.

Question Presented

Does the mere formation of a group whose members collectively own more than 10% of the outstanding shares of a given class of registered stock require a filing under § 13(d) of the Securities Exchange Act of 1934, 15 U. S. C. § 78m(d)?

Statute Involved

The relevant provisions of the Securities Exchange Act of 1934 enacted by the Williams Act of 1968 and applicable in this case are set out in Appendix C. The amendments of December 22, 1970, 84 Stat. 1497, which (*inter alia*) reduced the 10% figure to 5%, do not affect the question here presented (except, of course, to aggravate the impact of the decision below on non-management groups).

Statement of the Case

A. *The Williams Act.* The Williams Act, in the wake of a rash of takeover bids, added §§ 13(d), 13(e) and 14(d)-(f) to the Exchange Act in 1968. 82 Stat. 454, 15 U. S. C. §§ 78m(d), 78m(e), 78n(d)-(f).

Section 14(d)—which was added to § 14, the proxy section, and is not involved in this case—was designed to regulate takeover bids ("tender offers" in statutory terminology) more or less like proxy contests. That section, however, afforded no information to investors before the making of a tender offer, or when one sought to "acquire a substantial block of equity securities * * * through the open market or privately negotiated purchases." 113 Cong. Rec. 24664 (1967) (Sen. Williams). To fill the gap somewhat, Congress added § 13(d) to § 13, the *reporting* section. Section 13(d)(1) provided that "Any person who, after

acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered * * *, is directly or indirectly the beneficial owner of more than 10 per centum of *such class*" should within ten days file certain information with the Commission and send it to the issuer and every exchange where the security was traded. (Italics supplied.) And § 13(d)(2) required the filing of an amendment to reflect "any material change" in the facts previously reported.

In Rules 14d-1 and 13d-1, 17 C. F. R. §§ 240.14d-1, 240.13d-1, the Commission prescribed Schedule 13D for the initial filing under both sections. That schedule requires, among other things, a statement of "the purpose or purposes of the purchase or proposed purchase" and, if one of the purposes is to acquire control, a description of any plans to merge or make any other major changes in the company's business or corporate structure. Item 4.

The two sections are also parallel in two other respects here significant:

(1) Sections 13(d)(3) and 14(d)(2) provide in identical language:

> When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(2) In terms of the section designations in effect before the Williams Act amendments of December 22, 1970, §§ 13(d)(5) and 14(d)(8) contained a series of similar exemptions, including one (as phrased in § 13(d)(5)(B), although § 14(d)(8)(B) was to the same effect) for

> any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same

person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class.

B. *The Complaint.* The complaint charged the petitioners with (1) failure to file timely Schedules 13D in violation of § 13(d), and (2) the filing of false and misleading Schedules 13D in violation also of Rule 10b-5, 17 C. F. R. § 240.10b-5. The GAF management sought to enjoin the petitioners from (a) acquiring or attempting to acquire any GAF shares (preferred or common), (b) soliciting proxies, or (c) voting any of their GAF shares.

C. *Petitioners' GAF Holdings.* Since 1967 the petitioners, a father and his three adult children, have owned some 10.25% of the GAF preferred shares outstanding. They received virtually all of those shares as a result of GAF's acquisition of The Ruberoid Company in May, 1967. Just before that event they owned about 8% of the Ruberoid common and GAF owned about 26%. The petitioners' holdings rose from 8% of Ruberoid common to 10.25% of GAF preferred solely as a result of GAF's cancellation of its own Ruberoid holdings in connection with the merger.

Since July, 1968, the effective date of § 13(d), no petitioner has acquired a single share of GAF preferred. Two of the petitioners, Paul and Seymour Milstein, have purchased 237,600 shares of GAF common, about 1.7% of the 13,612,827 shares of common stock outstanding. But § 13(d) speaks of acquisitions of the same "class."

D. *The Filings.* On September 24, 1970, almost three months before the institution of this action, the petitioners voluntarily filed a Schedule 13D and sent copies to various stock exchanges, GAF and others. That schedule disclosed, *inter alia,* the extent of their holdings in GAF and their current position with respect to both future acquisitions and

the possibility of a takeover attempt. On November 10, 1970, the petitioners brought their original filing current. And on January 27, 1971, upon the formation of the GAF Stockholders Protective Committee, they filed an additional Schedule 13D, as well as Schedules 14B pursuant to Rule 14a-11(c), 17 C. F. R. § 240.14a-11(c), in connection with the proxy contest on which they had by then decided (and which they ultimately lost). That Schedule 13D was amended on February 23, 1971. The January and February filings updated the previous filings, disclosed the petitioners' participation in the committee, and outlined the aims and plans of the committee in the proxy contest.

All these filings were made under specific disclaimers of the applicability of § 13(d) and without any demand from the SEC, which has not appeared in these proceedings.

E. *The Decisions Below.* The District Court dismissed the complaint for (1) failure to state a claim on which relief could be granted under § 13(d) and (2) lack of standing under Rule 10b-5. The Court of Appeals affirmed with respect to Rule 10b-5. But it reversed with respect to the *late filing* claim under § 13(d). In addition, the court sustained against dismissal under § 13(d) the claim of *false* filings that it refused to entertain under Rule 10b-5.

REASONS FOR GRANTING THE WRIT

First: The decision below, as the court explicitly recognized (p. 14a *infra*), is "in disagreement with the interpretation" of the Seventh Circuit in *Bath Industries, Inc.* v. *Blot*, 427 F. 2d 97, *aff'g* 305 F. Supp. 526 (E. D. Wis.). Indeed, in the less than four years since the enactment of § 13(d), the lower courts have expressed *three* disparate views on the precise question here at issue:

(1) Judge Pollack's decision here aside, two other district judges (one in another circuit) have held—and we

submit this is the correct construction—that, since (a) § 13(d)(1) requires a report within ten days of a person's becoming the beneficial owner of more than 10% of a class "after acquiring" the beneficial ownership of a security of the class, and (b) § 13(d)(3) says simply that "a group shall be deemed a 'person,'" and (c) § 13(d)(5)(B) (now § 13(d)(6)(B)) *exempts* acquisitions of not more than 2% of the class in twelve months, the filing requirements (in Judge Webster's words) "are not triggered by the mere formation of a group having the 10% interest in the aggregate, with a view to gaining control, absent *further acquisitions* by the group." *Ozark Air Lines, Inc.* v. *Cox*, 326 F. Supp. 1113, 1118 (E. D. Mo.) (italics in original); *Sisak* v. *Wings & Wheels Express, Inc.*, CCH Fed. Sec. L. Rep. ¶ 92,991 (S. D. N. Y.). The fact that the two cases reached opposite results on the separate question whether § 13(d) covers an estate's acquisition by operation of law serves only to emphasize their agreement on the question here at issue.

(2) In *Bath* the Seventh Circuit concluded that the mere formation of a group did not activate § 13(d), but that, "once the group *agrees* to act in concert *to acquire shares*, its members must comply with the Act's disclosure requirements whether or not any one of them has at that time acquired stock in furtherance of the underlying plan." 427 F. 2d at 110 (italics in original). The opinion is not clear just how soon after such an agreement the filing must be made. For the court concluded that "once it is shown that such a group has agreed to pursue a common objective, and once it is further shown that a member of the group has *thereafter* purchased additional shares of the corporation's stock, then a *rebuttable presumption* arises that such purchase was made pursuant to an agreement of the group as of that date to acquire shares in furtherance of its objec-

tives"—which apparently looks to a due date ten days after the agreement—but in the very next sentence said: "Compliance with the Act's disclosure provisions would be required within ten days of such purchase." Ibid. (italics in original). In either event, the court specifically recognized the 2% exemption. 427 F. 2d at 111, n. 7. And, whatever the due date under the Seventh Circuit's view, the present petitioners would *never* have had to file. For, unlike the insurgent group in *Bath,* which acquired much more than 2%, to the point of holding more than 50% of the voting power, here the petitioners did not acquire a *single share* of preferred, let alone 2% of that class, and in the aggregate their total voting power amounts to only 4% of both common and preferred stock.

(3) The Second Circuit here—by focusing on a passage in the legislative reports that (as we shall show) is irreconcilable with the legislative history as a whole, not to mention the language of the statute itself and compelling factors of public policy—concluded, on the theory of a group's "acquisition" *from its members,* that the filing requirement was triggered by the formation of a more-than-10% group *simpliciter.*

There are a number of considerations, we respectfully urge, that make the conflict the more deserving of the Court's attention:

(a) Unless reversed, the erroneous reading of the "group" concept—especially since the decision below quite properly charges *management* with primary enforcement of § 13(d) [cf. *J. I. Case Co.* v. *Borak,* 377 U. S. 426]—will play into the hands of entrenched management, which will use § 13(d) as a sword to hobble shareholder democracy. Thus, the decision will impair the neutrality that Congress was careful to preserve.

(b) The Seventh Circuit in *Bath* properly recognized that § 13(d) "does not proscribe informal discussion among existing shareholders concerning the performance of current management," and held that even "legitimate cooperation among existing shareholders to assert their determination to take over control of management, *absent* an intention to acquire additional shares for the furtherance of such a purpose," was not forbidden. 427 F. 2d at 110 (italics in original). By contrast, the Second Circuit —by holding that the formation of a group without more is a reportable event but failing at the same time to lay down guidelines as to what activities constitute that formation—has raised the specter of a classic "prior restraint."

(c) Because of the position of New York City in the financial life of the country, the Second Circuit has always played a dominant role in litigation under the SEC statutes generally, deciding over the years perhaps as many cases as all the other Courts of Appeals combined. On this very ground, other courts outside the Seventh Circuit (and the Eastern District of Missouri) are likely to defer to the expertise of the Second Circuit despite its erroneous construction in this burgeoning area of securities law.

Second: The court below has erroneously decided an important question of federal law that should be settled by this Court. Indeed, the court went out of its way to recognize that it was interpreting a new federal statutory provision having a potentially broad impact on the securities market, stating that its decision was "on a relatively *tabula rasa*" (p. 2a, *infra*).

(1) *Text of the Statute:* (a) In marked contrast to the insider trading provision, § 16(a), 15 U. S. C. § 78p(a), which has provided since its enactment in 1934

that every person "who *is* * * * the beneficial owner of more than 10 per centum * * * shall file," the later enacted § 13(d)(1) provides that "Any person who, *after acquiring* * * * the beneficial ownership of any equity security * * *, is * * * the beneficial owner of more than 10 per centum" shall file. (Italics supplied.) The opinion below, by inventing the fiction that a group's members have "acquired" each other interests, simply ignores this contrast.

(b) When § 13(d)(3) provides that a "group for the purpose of acquiring, holding, or disposing of securities of an issuer * * * shall be deemed a 'person,'" this is simply and obviously a device to prevent evasion through the use of joint ventures. There is no warrant for reading § 13(d)(3) as imposing *more* stringent requirements on a group than on an individual. Section 13(d)(3), essentially a *definitional* provision, must not be read as if it were the *operative* section. The operative provision is § 13(d)(1)—which does not contain the "holding" or "disposing" language of § 13(d)(3)—and the only effect of § 13(d)(3) when incorporated into § 13(d)(1) is to make that section read: "Any person *or group* that, after acquiring * * * the beneficial ownership of any equity security * * *, is * * * the beneficial owner of more than 10 per centum" shall file.

(c) Under the Second Circuit's reading of the statute as contemplating the "acquisition" by a group from its individual members, a group, unlike an individual, would never be able to take advantage of the 2% exemption.

(d) That construction of "acquisition" also ignores the language of Clauses (A)-(C) of § 13(d)(1), which, in specifying the kinds of information to be required by the Commission, refer repeatedly and consistently to "purchases."

(3) *Legislative History*: The entire case for the plaintiff rests on the following passage from the 1968 committee reports:

> The group would be deemed to have become the beneficial owner, directly or indirectly, of more than 10 percent of a class of securities at the time they agreed to act in concert. Consequently, the group would be required to file the information called for in section 13(d)(1) within 10 days after they agreed to act together, whether or not any member of the group had acquired any securities at that time.

S. Rep. No. 550 at 8 and H. R. Rep. No. 1711 at 8-9, 90th Cong., 2d Sess., [1968] U. S. Code Cong. & Ad. News 2811, 2818.* But this passage does not constitute the *whole* legislative history. For one thing, S. 510 was changed before passage to reflect a specific objection that filing should be required "only with respect to acquisitions taking place after the effective date of the act," and to reject a contrary suggestion that then-existing holders as well as future holders of 10% blocks should be required to file. *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids,* Hearings before Subcom. on Securities, S. Com. on Banking & Currency, 90th Cong., 1st Sess., pp. 4, 136, 150.

We have never contended—and we are not so naive as to suggest—that a court should deprive itself of any "relevant aid to construction," *United States* v. *Dickerson,* 310 U. S. 554, 562, among which legislative history is next in importance only to statutory text. What we do say is that "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States*

---

*These reports were paraphased, without more, in 6 Loss, *Securities Regulation* 3664 (1969 Supp.).

v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543. And we respectfully submit that the lower court's attempt to reconcile the passage from the committee reports with the text by manufacturing the concept of a group acquisition from its individual members (a concept *nowhere* referred to in the legislative history) does too much violence to the "after acquiring" language of § 13(d)(1)—not to mention the 2% exemption—to be supportable. Laws, especially those with criminal sanctions (§ 32(a)), should not say one thing and mean another.

(4) *Policy Considerations*: The lower court's preference for the language of the committee reports over the text is the more surprising because policy considerations point to the latter, not the former:

(a) The task of ascertaining exactly when a group has been formed would be (as Judge Pollack aptly put it) "akin to an attempt to grasp quicksilver"—particularly in the case of a group consisting of close relatives whose "alleged conspiratorial agreement" may have begun "as complaints voiced during a dinner or other family gatherings." 324 F. Supp. at 1068-69. Unless it is absolutely compelled, a construction that would invite cross-examinition with respect to this kind of speech—conceivably in some case after one member of the family had fallen out with his relatives, which sometimes happens—is not to be relished in a free society.

(b) Under the construction below it seems safe to predict that the litigation that seems inevitably to accompany a proxy contest will be further complicated in the future by management allegations of failure to file under § 13(d) within ten days after formation of a non-management group owning (as the statute now reads) more than 5% of a class. Moreover, the decision below comes

close to eliminating the exemption in Rule 14a-2(a) of the proxy regulation, 17 C. F. R. § 240.14a-2(a), for non-management solicitations of not more than ten persons. Thus it not only upsets the harmony with the "clearly related * * * proxy provisions" that was emphasized both by the *Bath* court (427 F. 2d at 110) and by Senator Williams (113 Cong. Rec. 24665), but also tears away "the right of existing shareholders to assess the scope of available support on matters of legitimate concern to them" (427 F. 2d at 110).

(c) Perhaps the most significant consideration on the policy level is the "extreme care" that was taken by Congress "to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids." *Bath Industries, Inc.* v. *Blot,* 427 F. 2d at 109, quoting from Sen. Williams in 113 Cong. Rec. 24664. There is state legislation that, unhappily, has ignored the truism that incumbent management has no protected interest in remaining in power. See *Symposium—Controlling Corporate Takeover Bids: State Regulation and the Ohio Approach,* 21 Case W. Res. L. Rev. 605. But there is every reason to believe that Congress took to heart the ample warnings that the Williams Bill should not serve merely to give entrenched management another sword. See *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids,* Hearings before Subcom. on Securities, S. Com. on Banking & Currency, 90th Cong., 1st Sess., p. 135; Fleischer and Mundheim, *Corporate Acquisitions by Tender Offer,* 115 U. Pa. L. Rev. 317, 321-22, 360-71; Brudney, *A Note on Chilling Tender Offers,* 21 Rutgers L. Rev. 309. Not all takeover bidders are raiders, and not all entrenched managements are saints in striped trousers. See Hayes and Taussig, *Tactics of Cash Takeover Bids,* 45 Harv. Bus. Rev. 135, esp. at 139 (Mar.-Apr. 1967).

Is the construction below to be applied only to presumptuous insurgents—which would make § 13(d) a pro-management piece of legislation with a vengeance—or must every *management* "group" (which is to say, normally, every aggregation of directors and officers together with their wives and at least their minor children) file a Schedule 13D within ten days after its formation if it holds in the aggregate more than 5% of a registered equity security? The Court below acknowledged this question but did not adequately explore its implications. See p. 16a *infra*.

(d) In the final analysis, it is not even clear that there would have been any point in specifically requiring (as it would have been easy enough to do) that a report be filed within ten days after the *formation* of a specific group; for, as Judge Pollack put it: "It is money and not numbers that counts here." 324 F. Supp. at 1068.

One final point: A writ of certiorari should not be withheld on the ground that the allegations of *false* filings must be assumed to be true for purposes of a motion to dismiss the complaint even if it be assumed that the petitioners had no duty to file. For the Second Circuit's use of § 13(d) as the basis for the standing that it so carefully withheld under Rule 10b-5—far from effectuating this Court's instruction that the SEC statutes "should not be construed technically and restrictively, but 'flexibly to effectuate [their] remedial purposes'" [p. 18a *infra*, quoting from *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 195]—is not only unneccessary but also potentially mischievous in its implications:

(a) It is unnecessary, because, quite apart from the criminal penalty that § 32(a) of the Securities Exchange Act imposes on any person who willfully and knowingly

makes materially false or misleading statements in any filing with the Commission, Rule 10b-5 (not to mention other antifraud provisions) subjects to the whole arsenal of administrative, injunctive and criminal sanctions any person whose false statements are "in connection with" the purchase or sale of a security. See *Superintendent of Insurance of the State of New York* v. *Bankers Life & Casualty Co.*, 404 U. S. 6.

(b) The construction in question may be positively mischievous when applied, for example, to false registration statements under the closely related Securities Act of 1933. Sections 11 and 12(2) of that statute, 15 U. S. C. §§ 77k, 77l(2), impose civil liabilities for misstatements in selling securities, but subject to various defenses going to reasonable care and to the *plaintiff's* knowledge. On the other hand, § 12(1), 15 U. S. C. 77l(1), imposes an *absolute* liability on any person who (*inter alia*) sells a security in violation of the requirement in § 5(b), 15 U. S. C. § 77e(b), that he use a prospectus that meets the requirements of § 10, 15 U. S. C. § 77j. If (in the language of the court below, *infra* p. 18a) "the obligation to file *truthful* statements is implicit in the obligation to file" and deliver a prospectus, then the use of a false prospectus violates § 5(b) and creates absolute liability under § 12(1) without regard to the defenses and other restrictions in §§ 11 and 12(2).

This is merely to say (i) that the "remedial purpose" axiom is apt to be a hazardous solvent rather than a cure-all when applied to isolated provisions in statutes as complex as these, and (ii) that it is as dangerous as it is needless, in statutes as symmetrically drafted as these, to transform filing provisions (which are *mala prohibita*) into fraud-type provisions (which are *mala in se*).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS LOSS
Langdell Hall
Cambridge, Massachusetts 02138
Attorney for Petitioners

Of Counsel:

STROOCK & STROOCK & LAVAN
61 Broadway
New York, New York 10006

DAVID LUBART
CHARLES G. MOERDLER
GARY J. GREENBERG
STEPHEN A. BLOCK
ROBERT P. STEIN

March, 1972

APPENDIXES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 280—September Term, 1971.

(Argued November 10, 1971 Decided December 13, 1971.)

Docket No. 71-1503

GAF CORPORATION,

Plaintiff-Appellant,

v.

PAUL MILSTEIN, SEYMOUR MILSTEIN, GLORIA MILSTEIN FLANZER and MORRIS MILSTEIN,

Defendants-Appellees.

Before:

KAUFMAN and MANSFIELD, *Circuit Judges*, and LEVET, *District Judge.**

Appeal from an order of the United States District Court for the Southern District of New York, Milton Pollack, *Judge*, 324 F. Supp. 1062 (1971), dismissing under Rule 12(b)(6) appellant's complaint alleging violations of sections 13(d) and 10(b) of the Securities Exchange Act for failing to file and then filing false statements required by section 13(d).

Reversed in part; affirmed in part.

*Of the Southern District of New York, sitting by designation.

Appendix A

EDWIN J. WESELY, New York, New York (Winthrop, Stimson, Putnam & Roberts, New York, New York, Richard A. Horgan, Eugene G. McGuire, of counsel), *for Appellant.*

LOUIS Loss, Cambridge, Mass. (Stroock & Stroock & Lavan, New York, New York, David Lubart, Charles G. Moerdler, Stephen A. Block, Robert P. Stein, of counsel), *for Appellees.*

KAUFMAN, *Circuit Judge:*

This appeal involves the interpretation of section 13(d) of the Securities Exchange Act,[1] hitherto a largely unnoticed provision[2] added in 1968 by the Williams Act.[3] We write, therefore, on a relatively *tabula rasa,* despite the burgeoning field of securities law. Essentially, section 13(d) requires any person, after acquiring more than 10% (now 5%[4]) of a class of registered equity security,

---

[1]15 U. S. C. § 78m(d).

[2]We are aware of only four other cases which considered the section. *Bath Industries, Inc.* v. *Blot,* 305 F. Supp. 526 (E. D. Wis. 1969), *aff'd,* 427 F. 2d 97 (7th Cir. 1970); *Ozark Airlines, Inc.* v. *Cox,* 326 F. Supp. 1113 (E. D. Mo. 1971); *Sisak* v. *Wings and Wheels Express, Inc.,* CCH Fed. Sec. L. Rep. ¶92,991 (S. D. N. Y. Sept. 9 1970); *Grow Chemical Corp.* v. *Uran,* 316 F. Supp. 891 (S. D. N. Y. 1970). *See generally* Comment, *Section 13(d) and Disclosure of Corporate Equity Ownership,* 119 U. Pa. L. Rev. 853 (1971).

[3]Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat, 454, *amending* Securities Exchange Act §§ 12-14, 15, U. S. C. §§ 781-n.

[4]As of December 22, 1970, section 13(d)(1) was amended to require filing after the acquisition of 5%. Act of December 22, 1970, Pub. L. No. 91-567, § 1, 84 Stat. 1497, *amending* Securities Exchange Act § 13(d)(1), 15 U. S. C. § 78m(d)(1).

to send to the issuer and the exchanges on which the security is traded and file with the Commission the statement required by the Act.[5] Although the section has not attracted as much comment as section 14(d), also added by the Williams Act and requiring disclosure by persons engaging in tender offers, the section has potential for marked impact on holders, sellers, and purchasers of securities.

GAF Corporation filed its complaint in the United States District Court for the Southern District of New York alleging that Morris Milstein, his two sons, Seymour and Paul, and his daughter, Gloria Milstein Flanzer, violated section 13(d) of the Securities Exchange Act first by failing to file the required statements and then by filing false ones. The complaint also alleged violation of section 10(b) based on the same false statements and, in addition, market manipulation of GAF stock. The Milsteins moved for dismissal under Rule 12(b)(6), F.R.Civ. P., on the ground that the complaint failed to state a claim on which relief could be granted or, in the alternative, for summary judgment under Rule 56. Judge Pollack aptly framed the issues involved:

> The ultimate issue presented by the defendants' motion to dismiss the first count is whether, organizing

---

[5]Section 13(d)(1) empowers the Commission to require disclosure of information "necessary or appropriate in the public interest or for the protection of investors," and specifically requires: (A) the background and identity of the persons filing, (B) the source and amount of funds for any purchases, (C) any plans the persons have with respect to the issuer if their purpose is to acquire control, (D) the number of shares owned and (E) information concerning any contracts, arrangements or understandings with any person with respect to any securities of the issuer. In accordance with this mandate, the Commission pursuant to Rule 13d-1, has prescribed Schedule 13D, 17 C. F. R. § 240.13d-101, for those required to file.

> a group of stockholders owning more than 10% of a class of equity securities with a view to seeking control is, without more, a reportable event under Section 13(d) of the Exchange Act; and as to the second count, whether in the absence of a connected purchase or sale of securities, the target corporation claiming violation of Section 10 and Rule 10b(5), has standing to seek an injunction against a control contestant for falsity in a Schedule 13D filing. (Footnote omitted.)

324 F. Supp. 1062, 1064-65 (S. D. N. Y. 1971). Judge Pollack granted the Milsteins' motion to dismiss under Rule 12(b)(6), and GAF has appealed. We disagree with Judge Pollack's determination that GAF failed to state a claim under section 13(d) and Rule 13d-1 promulgated thereunder, and thus reverse his order in this respect, but we affirm the dismissal of the second claim of the complaint on the ground that GAF, as an issuer, has no standing under section 10(b).

Before considering the merits of the issues involved on appeal, a statement of the facts as presented in the complaint and the briefs is in order.[6] We note also that in this posture of the proceeding we must accept as true all well pleaded allegations in the complaint.

The four Milsteins received 324,166 shares of GAF convertible perferred stock, approximately 10.25% of the preferred shares outstanding, when The Ruberoid Company, in which they had substantial holdings, was merged into

---

[6]Although a Rule 12(b)(6) motion is addressed solely to the face of the complaint, and our determination on this appeal is based on whether a claim was stated on its face, both parties have discussed the facts extensively in their respective briefs. We make reference to those facts for the purpose of setting forth the background of the dispute.

GAF in May, 1967. They have not acquired any additional preferred shares since the merger.[7]

The complaint informs us that at some time after July 29, 1968, the effective date of the Williams Act,[8] the Milsteins "formed a conspiracy among themselves and other persons to act as a syndicate or group for the purpose of acquiring, holding, or disposing of securities of GAF with the ultimate aim of seizing control of GAF for their own personal and private purposes." It is necessary for our purposes to examine only a few of the nine overt acts GAF alleged were taken in furtherance of this conspiracy.

The complaint alleged that initially the Milsteins sought senior management and board positions for Seymour Milstein with GAF. When this sinecure was not forthcoming, the Milsteins allegedly caused Circle Floor Co., Inc., a company in their control, to reduce its otherwise substantial purchases from GAF.[9] It also charged that the Milsteins thereafter undertook a concerted effort to disparage its management and depress the price of GAF common and preferred stock in order to facilitate the acquisition of additional shares. On May 27, 1970, the Milsteins filed a derivative action in the district court, charging the directors, *inter alia,* with waste and spoliation of corporation assets. A companion action was filed in the New York courts. GAF further alleged that these actions were filed only to disparage management, to depress the price of GAF

---

[7]The 324,166 shares exclude 28,808 trust shares as to which the Milsteins disclaim beneficial ownership.

[8]Although the complaint does not allege a specific date for the initiation of the conspiracy, we accept Judge Pollack's construction that "[p]laintiff alleges that defendants, acting in conspiracy, determined to take over GAF sometime after July 29, 1968, . . ." 324 F. Supp. at 1064. The Milsteins have not challenged this determination.

[9]In fact, GAF commenced an antitrust action against Circle Floor, *GAF* v. *Circle Floor Co., Inc.*, 71 Civ. 792 (S. D. N. Y.). This action has been dismissed.

stock and to use discovery devices to gain valuable information for their takeover conspiracy.

In the meantime, the complaint tells us, Paul and Seymour Milstein purchased respectively 62,000 and 64,000 shares of GAF common stock. When GAF contended that the Milsteins were in violation of section 13(d) because they had not filed a Schedule 13D as required by Rule 13d-1, the Milsteins, although disclaiming any legal obligation under section 13(d), filed such a schedule on September 24, 1970. In their 13D statement (appended to the complaint), the Milsteins disclosed their preferred and common holdings and stated they "at some future time [might] determine to attempt to acquire control of GAF. . . ." They also stated that they had "no present intention as to whether or not any additional securities of GAF [might] be acquired by them in the future. . . ." Indeed, within the next two months, commencing with October 2, Paul and Seymour each purchased an additional 41,650 shares of common. The Milsteins thereafter filed a Restated and Amended Schedule 13D on November 10 to reflect these new purchases.

Then, on January 27, 1971, the Milsteins filed a third Schedule 13D, disclosing their intention to wage a proxy contest at the 1971 annual meeting. Although the statement again disclaimed any present intention to acquire additional shares, Paul purchased 28,300 shares of common stock during February, 1971. These last purchases, which brought the Milsteins' total common holdings to 237,600 shares having a value in excess of $2 million and constituting 1.7% of the common shares outstanding, were reflected in a February 23 amendment to the January 27 Schedule 13D.

The last essential datum for our purposes is the proxy contest. On May 10, 1971, it was announced that GAF

management had prevailed at the April 16 meeting by a margin of some 2 to 1.[10]

GAF's complaint in this action filed on December 16, 1970, requested that the Milsteins be preliminarily and permanently enjoined from (1) acquiring or attempting to acquire additional GAF stock; (2) soliciting any proxy from a GAF shareholder to vote GAF stock; (3) voting any shares of GAF stock held or acquired during the conspiracy; and (4) otherwise acting in furtherance of the conspiracy. It asks for this relief "until the effects of the conspiracy have been fully dissipated and the unlawful acts committed pursuant to the conspiracy fully corrected. . . ."[11]

---

[10]The Milsteins unsuccessfully brought an action on March 15 to enjoin Jesse Werner, Chairman of the Board and President of GAF, and others from soliciting or voting proxies. Their motion for a prelminary injunction was denied, CCH Fed. Sec. L. Rep. ¶ 92,986 (S. D. N. Y. April 3, 1971), and they did not appeal.

[11]The Milsteins contend that this appeal should be dismissed as moot. The linchpin of their argument is that the GAF management was victorious in the 1971 proxy contest and thus, citing Justice Gray's 1895 rationale for treating appeals as moot, the district court cannot "grant [GAF] any effectual relief whatever." *Mills* v. *Green*, 159 U. S. 651, 653 (1895). The Milsteins also rely on a recent brief *per curiam* decision of this court where we held, in an action charging a violation of section 14(d)(1) and the Clayton Act, that "more than an abstract or nebulous plan to possibly commit a wrong sometime in the future, must be shown before the broad and potentially drastic injunctive power of the court will be exercised." *General Fireproofing Co.* v. *Wyman*, 444 F. 2d 391, 393 (2d Cir. 1971). In *Wyman*, we were concerned with a possible future violation of the securities acts that was "pure speculation." The complaint here alleges that past violations of section 13(d) are continuing and that the conspiracy to take over GAF "continues unabated." In the light of these allegations we cannot say that the litigation has become mooted or that the cause for complaint has abated. We are compelled to reiterate that we are not adjudicating facts, nor was the lower court called upon to do so. Moreover, the time is not at hand to consider what injunctive relief, if any, will be necessary to effectuate the policies of the Act in the event GAF should be successful on the merits.

Appendix A

I.

At the time the conspiracy allegedly was formed, section 13(d)(1) in relevant part provided:

> Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title . . . , is directly or indirectly the beneficial owner of more than 10 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement. . . .

This section, however, exempts from its filing requirements any acquisition which, "together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class." Section 13(d)(6)(B). Section 13(d)(3), which is crucial to GAF's claim, further provides that "[w]hen two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' for the purposes of [section 13(d)]." On the assumption that the facts alleged in the complaint are true, we cannot conclude other than that the four Milsteins constituted a "group" and thus, as a "person," were subject to the provisions of section 13(d). We also are aware of the charge that the Milsteins agreed after July 29, 1968, to hold their GAF preferred shares for the common purpose of acquiring control of GAF. Furthermore, the individuals collectively or as a "group" held more than

10% of the outstanding preferred shares—a registered class of securities. Since the section requires a "person" to file only if he acquires more than 2% of the class of stock in a 12-month period after July 29, 1968,[12] the principal question presented to us is whether the complaint alleges as a matter of law that the Milstein *group* "acquired" the 324,166 shares of preferred stock owned by its members after that date. We conclude that it does and thus that it states a claim under section 13(d).

The statute refers to "acquiring directly or indirectly the beneficial ownership of securities." Thus, at the outset, we are not confronted with the relatively simple concept of legal title, but rather with the amorphous and occasionally obfuscated concepts of indirect and beneficial ownership which pervade the securities acts.

The Act nowhere explicitly defines the concept of "acquisition" as used in section 13(d). Although we are aware of Learned Hand's warning "not to make a fortress out of the dictionary," *Cabell* v. *Markham*, 148 F. 2d 737, 739 (2d Cir.), *aff'd*, 326 U. S. 404 (1945), some light, although dim, is shed by Webster's Third International Dictionary. It tells us that "to acquire" means "to come into possession [or] control." If the allegations in the complaint are true, then the group, which must be treated as an entity separate and distinct from its members, could have gained "beneficial control" of the voting rights of the preferred stock[13]

---

[12]The Milsteins concede that their group would have been required to file if the individual members had acquired additional preferred shares after the effective date of the Williams Act and within a 12-month period which amounted to more than 2% of the outstanding shares.

[13]The convertible preferred stock votes share-for-share with the common stock. Each share of preferred is convertible into 1.25 shares of common stock.

only after its formation, which we must assume occurred after the effective date of the Williams Act. Manifestly, according to the complaint, the group when formed required [sic.] a beneficial interest in the individual holdings of its members. We find ourselves in agreement with the statement of the Court of Appeals for the Seventh Circuit in *Bath Industries, Inc.* v. *Blot*, 427 F. 2d 97, 112 (7th Cir. 1970), that in the context of the Williams Act, where the principal concern is focused on the battle for corporate control, "voting control of stock is the only relevant element of beneficial ownership." Thus, we hardly can agree with Judge Pollack that the language of the statute compels the conclusion that individual members must acquire shares before the group can be required to file.

We are well aware of the first catechism of statutory construction which teaches that we should begin the process of interpretation with "the language of the statute itself," *see Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 420 (1968); that, however, is *toto caelo* from saying that the process must end there or that we are required to blind ourselves to other relevant aids to construction, particularly when dealing with a statute as complex as the one before us. The wisdom of Learned Hand guides us again: "it is one of the surest indexes of a mature and developed jurisprudence . . . to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell* v. *Markham*, *supra*, at 739. *See also United States* v. *Dickerson*, 310 U. S. 554, 562 (1940). We are, therefore, totally puzzled by the experienced trial judge's conclusion that "the legislative reports should not be resorted to here since the specific statutory language is clear. . . ." 324 F. Supp. at 1067. Indeed, the statute before us is

anything but a model of clarity[14] and the ritualistic approach to statutory interpretation which the district judge suggests would close off the only light available to illumine the statute.

The legislative history, as well as the purpose behind section 13(d), bear out our interpretation. Any residual doubt over its soundness is obviated by the following clear statement appearing in both the House and Senate reports accompanying the Williams Act:

> "[Section 13(d)(3)] would prevent a group of persons who seek to pool their voting or other interests in the securites of any issuer from evading the provisions of the statute because no one individual owns more than 10 percent of the securities. *The group would be deemed to have become the beneficial owner, directly or indirectly, of more than 10 percent of a class of securities at the time they agreed to act in concert. Consequently, the group would be required to file the information called for in section 13(d)(1) within 10 days after they agree to act together, whether or not any member of the group had acquired any securities at that time.*" S. Rep. No. 550, 90th Cong., 1st Sess. 8 (1967); H. R. Rep. No. 1711, 90th Cong., 2d Sess. 8-9 (1968). (Emphasis added.)

Indeed, Professor Loss, one of the foremost scholars of securities law, reached the same interpretation in his treatise, citing this passage. 6 L. Loss, Securities Regulation 3664 (Supp. 1969).

---

[14]The meaning of "acquiring" hardly could be considered plain when two district court judges recently failed to agree on whether an inheritance of stock was an "acquisition." *Compare Sisak* v. *Wings and Wheels Express, Inc.*, CCH Fed. Sec. L. Rep. ¶ 92,991 (S. D. N. Y. Sept. 9, 1970), with *Ozark Airlines, Inc.* *Cox*, 326 F. Supp. 1113 (E. D. Mo. 1971).

Appendix A

The Senate and House reports and the Act as finally enacted, contrary to appellees' contention,[15] are entirely consistent in our view. This conclusion is buttressed by a consideration of the purpose of the Act. The 1960's on Wall Street may best be remembered for the pyrotechnics of corporate takeovers and the phenomenon of conglomeration. Although individuals seeking control through a proxy contest were required to comply with section 14(a) of the Securities Exchange Act and the proxy rules promulgated by the SEC, and those making stock tender offers were required to comply with the applicable provisions of the Securities Act, before the enactment of the Williams Act there were no provisions regulating cash tender offers or other techniques of securing corporate control. According to the committee reports:

> "The [Williams Act] would correct the current gap in our securities laws by amending the Securities Exchange Act of 1934 to provide for full disclosure in connection with cash tender offers and other techniques for accumulating large blocks of equity securities of publicly held companies." S. Rep. No. 550 at 4; H.R. Rep. No. 1711 at 4.

Specifically, we were told, "the purpose of section 13(d) is to require disclosure of information by persons who have acquired a substantial interest, or increased their interest in the equity securities of a company by a substantial amount, within a relatively short period of time." S. Rep.

---

[15]Appellees in their brief "concede" that the 1968 committee reports are "against" them. Professor Loss, co-counsel for the Milsteins both in this and the lower court, informed us at the argument that the view set forth in his treatise was "a mistake" and that this passage is "diametrically opposed to the text of the statute" and the purpose and intent of the Williams Act.

No. 550 at 7; H.R. Rep. No. 1711 at 8. Otherwise, investors cannot assess the potential for changes in corporate control and adequately evaluate the company's worth.[16] *See generally* Comment, *Section 13(d) and Disclosure of Corporate Equity Ownership,* 119 U. Pa. L. Rev. 853, 854-55, 858, 865-66 (1971).

That the purpose of section 13(d) is to alert the marketplace to every large, rapid aggregation or accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control is amply reflected in the enacted provisions. Section 13(d)(1)(C) requires the person filing to disclose any intention to acquire control. If he has such an intention, he must disclose any plans for liquidating the issuer, selling its assets, merging it with another company or changing substantially its business or corporate structure. It is of some interest, moreover, that section 13(d)(6)(D) empowers the Commission to exempt from the filing requirements "any acquisition . . . as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer *or otherwise* as not comprehended within the purpose of [section 13(d)]." (Emphasis added.)

The alleged conspiracy on the part of the Milsteins is one clearly intended to be encompassed within the reach of section 13(d). We have before us four shareholders who together own 10.25% of an outstanding class of securities and allegedly agreed to pool their holdings to effect a takeover of GAF. This certainly posed as great a threat to the

---

[16]The committee reports make it clear that the Act was designed for the benefit of investors and not to tip the balance of regulation either in favor of management or in favor of the person seeking corporate control. *See* S. Rep. No. 550 at 3-4; H.R. Rep. No. 1711 at 4.

stability of the corporate structure as the individual shareholder who buys 10.25% of the equity security in one transaction.[17] A shift in the *loci* of corporate power and influence is hardly dependent on an actual transfer of legal title to shares, and the statute and history are clear on this.

In light of the statutory purpose as we view it, we find ourselves in disagreement with the interpretation of *Bath Industries, supra,* that the group owning more than 10%, despite its agreement to seize control, in addition, must agree to acquire more shares before the filing requirement of section 13(d) is triggered. The history and language of section 13(d) make it clear that the statute was primarily concerned with disclosure of *potential changes* in control resulting from new aggregations of stockholdings and was not intended to be restricted to only individual stockholders who made future purchases and whose actions were, therefore, more apparent.[18] *See* Comment, *Section 13(d) and Disclosure of Corporate Equity Ownership,* 119 U. Pa. L. Rev. 853, 869-72 (1971). It hardly can be questioned that a group holding sufficient shares can effect a takeover without purchasing a single additional share of stock.

---

[17]The appellees correctly argue that section 13(d) was not intended to be retroactive—that is, all persons who held 10% of an outstanding class before July 29, 1968, are not required to file unless they acquire an additional 2% after that date. *Compare* § 16(a). But, the Milstein group is not a "person" who held its stock before the effective date of the Williams Act, if the allegations of the complaint are to be accepted. The crucial event under section 13(d) was the formation of the group, which allegedly occurred after the effective date and the purpose of which was to seize control of GAF.

[18]Section 13(d)(3) refers to groups formed "for the purpose of acquiring, holding, *or* disposing of securities." *Bath Industries* would read out "holding" and "disposing."

Appendix A

Two "policy" considerations have been advanced against our interpretation.[19] First, the district judge warned that "[t]he inherent difficulty of ascertaining when a group was formed is akin to an attempt to grasp quicksilver." 324 F. Supp. at 1068. This supposed difficulty, however, would not be dissipated even under his view—that individual members must acquire more that 2% after July 29, 1968, before the group can be compelled to file. The court still would be required to determine whether the individuals indeed constituted a "group." But, we hardly envision this as an insuperable obstacle to stating a claim in a complaint. GAF, in order to succeed on the merits, will have to carry its burden of proof by a fair preponderance of the evidence. It will have to produce evidence establishing that the conspiracy came into being after July 29, 1968, with the purpose of seizing control. If GAF should succeed on the merits, any difficulty in pinpointing the precise date, as distinguished from an approximate time, when the conspiracy was formed and the group became subject to

[19]Several commentators have lauded tender offers as a healthy process for unseating inefficient, entrenched management; they warned against giving management another sword which would stifle all takeovers. *See, e.g.*, Brudney, *A Note on Chilling Tender Offers*, 21 Rutgers L. Rev. 309 (1967); Fleischer and Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 321-22, 360-70 (1967). Congress was fully apprised of these views during the hearings on the Williams bill. *See, e.g.*, Senate Hearings on S. 510, before the Subcomm. on Securities of the Senate Comm. on Banking & Currency, 90th Cong., 1st Sess., at 136-39 (Statement of Prof. Robert Mundheim). Any judicial impetus to cut back on the seeming thrust of the statute must be scrutinized in light of the recent amendment which broadened the impact of section 13(d) by reducing the threshold triggering of the statute from 10% holdings to 5%. *See* note 4 *supra*. Although we are well aware that it was Congress's intention primarily to protect investors in the security, the statute cannot be faulted if it achieves this goal without a question, and as a by-product management also becomes aware of those seeking to seize control of the corporation.

section 13(d) can be one of the elements considered by the district judge in fashioning appropriate equitable relief.

The Milsteins also caution us against throwing our hook into the water and catching too many fish—namely, hundreds of families and other management groups which control companies with registered securities and whose members collectively own more than 5% of a class of the company's stock. Although this problem is not part of the narrow issue we must decide, we cannot close our eyes to the implications of our decision. Upon examination, however, the argument while superficially appealing proves to be totally without substance. Management groups *per se,* are not customarily formed for the purpose of "acquiring, holding, or disposing of securities of [the] issuer" and would not be required to file unless the members conspired to pool their securities interests for one of the stated purposes.[20]

II.

It is not sufficient that we merely conclude that the allegations of the complaint state a violation of section 13(d). We also must determine whether GAF has standing to assert those violations. Here, unlike in our prior discussion we write with the aid of substantial precedent.

The Milsteins do not contend, with good reason, that there is no private right of action under section 13(d).

---

[20]The more difficult question, and a question we need not decide on this appeal, is whether management groups which expressly agree to pool their interests to fight a potential takeover are subject to section 13(d). Nor do we intimate any view on whether an insurgent group which has filed under section 13(d) and subsequently is successful in its takeover bid remains subject to the section. In any event, as we have already indicated, the Commission can forestall any untoward effects under the exemptive power conferred upon it by section 13(d)(6)(D).

The teachings of *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), are part of the ABC's of securities law. Nor do the Milsteins challenge the standing of GAF as an issuer.[21]

We have already held that an issuer has standing to assert violation of section 14(a), governing proxy contests, *Studebaker Corp.* v. *Gittlin*, 360 F. 2d 692 (2d Cir. 1966), and of section 14(d) and (e), governing cash tender offers. *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F. 2d 937 (2d Cir. 1969). These sections, enacted at the same time as section 13(d), are the close companions of that section in the regulatory scheme requiring disclosure in the context of struggles for corporate power.

There are compelling reasons in addition to preserving symmetry which mandate that GAF has standing. "In determining who has standing to enforce duties created by statute, a court's quest must be for what will best accomplish the purposes of the legislature." *Electronic Specialty, supra*, at 946. *See also J. I. Case Co.* v. *Borak, supra*, at 433 ("... it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."). GAF, as the issuer, unquestionably is in the best position to enforce section 13(d). The statute requires a copy of the statement to be sent by registered mail to the issuer (this provision alone might support the issuer's standing), and the issuer, in the course of constantly monitoring transactions in its stock, better than anyone else will know when there has been a failure to file. *Cf.* Comment, 81 Harv. L. Rev. 501, 502 (1967). Moreover, the issuer has not only the resources, but the self-interest so vital to maintaining an

[21] Clearly, a shareholder has standing. *See Grow Chemical Corp.* v. *Uran*, 316 F. Supp. 891 (S. D. N. Y. 1970).

injunctive action. *See Electronic Specialty, supra,* at 946. To play upon management's self-interest, of course raises some threat to Congress's express desire not to tip the scales in favor of incumbent management as against the takeover group. But, this danger can be adequately counteracted if the district court carefully scrutinizes self-serving management claims allegedly made in the interest of investor protection. And, as *Electronic Specialty, supra* at 946, recognized, "in cases where management causes the corporation to bring a suit motivated by its own interests and contrary to the best interests of the true owners, shareholders have their usual remedies for waste."

III.

The more difficult question is whether GAF has standing under section 13(d) to seek an injunction against allegedly false and misleading filings. The Milsteins in their brief argue that "the short answer" is that false filing does not violate the section that requires the filing—i.e., section 13(d)—but rather the penal provision on false filings, section 32(a), or one of the anti-fraud provisions, for example, section 10(b). This response, deceptively pleasing in its simple, compartmental approach to the Securities Exchange Act, immediately brings to mind the Supreme Court's instruction that the securities acts should not be construed technically and restrictively, but "flexibly to effectuate [their] remedial purposes." *S. E. C.* v. *Capital Gains Research Bureau, Inc.,* 375 U. S. 180, 195 (1963). With this teaching in mind, we conclude that the obligation to file *truthful* statements is implicit in the obligation to file with the issuer, and *a fortiori,* the issuer has stand-

ing under section 13(d) to seek relief in the event of a false filing.[22]

The Williams Act was entitled "An Act Providing for full disclosure of corporate equity ownership of securities under the Securities Exchange Act of 1934." In particular, section 13(d) was intended to alert investors to potential changes in corporate control so that they could properly evaluate the company in which they had invested or were investing. Disclosure which is false or misleading subverts this purpose. In some instances, a false filing may be more detrimental to the informed operation of the securities markets than no filing at all. We also find support for our conclusion in section 13(d)(2) which places a continuing

---

[22]We have not lost sight of the fact that Congress, when it enacted section 14(d), requiring disclosure by tender offerors, also enacted section 14(e), declaring it illegal to make false or misleading statements in connection with a tender offer, and that section 13(d) has no parallel section. It has been urged that this statutory scheme evidences an intent to bar fraud actions under section 13(d). But, without a clearer indication from Congress, we cannot overlook the fact that a tender offer transaction entails methods clearly distinguishable from section 13(d) dealings. When one makes a tender offer, there is extensive communication to the shareholders. Since section 10(b), which deals with fraud "in connection with the purchase or sale of any security," does not provide a remedy to shareholders with respect to such communications, *see Iroquois Industries, Inc.* v. *Syracuse China Corporation*, 417 F. 2d 963 (2d Cir. 1969), *cert. denied*, 399 U. S. 909 (1970), there was a clear need for an antifraud provision. A 13(d) transaction, on the other hand, ordinarily does not entail regular communications with the shareholders. We should not be wooden or rigid in granting the right to the issuer seeking equitable or prophylactic relief—not monetary damages—to take the necessary steps to effectuate the purposes of section 13(d). *See J. I. Case Co.* v. *Borak*, *supra*, at 433; *Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F. 2d 540, 546-47 (2d Cir. 1967); *cf. Electronic Specialty*, *supra*, at 946.

Of course, persons subject to section 13(d) may confer or communicate with shareholders in the course of a takeover attempt. If there is a purchase or sale of securities, section 10(b) will apply. If there is a proxy solicitation, section 14(a) will apply.

obligation on the person filing to amend his statements "[i]f any material change occurs in the facts set forth." Indeed, it is an argument not without force to urge that false statements immediately place those required to file in violation of Rule 13d-2 which requires "prompt" amendment.[22]

It is no answer to the query whether the issuer has standing to seek injunctive relief to respond that the Commission can proceed under penal provisions. The issuer is the only party which can promptly and effectively police Schedule 13D filings, for it is fair to assume that it scrutinizes carefully changes in its stock ownership—particularly of the sort which can initiate control. And in *Borak*, the Court instructed that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action." 377 U. S. at 432. Even if the Commission had the requisite manpower to delve into the details of each Schedule 13D filing, it does not have the issuer's day-to-day familiarity with the facts which would enable it to appraise accurately the statements in the Schedule. An already overburdened Commission staff, taxed with reviewing increased filings under the securities acts, should welcome "a necessary supplement" to its action.

Nor is it realistic to expect shareholders to deter persons from filing inaccurate statements by resort to the anti-

---

[22]GAF informs us that the Milsteins' first Schedule 13D, dated September 24, 1970, was false because it disclaimed any present intention to acquire additional stock, whereas Paul and Seymour Milstein purchased 83,800 shares of GAF common stock within the next two months. The Milsteins, however, did not amend their Schedule 13D until after these purchases were completed. Thus, even assuming that the statement filed on September 24 accurately and truthfully reflected their intentions, clearly those intentions changed when the Milsteins decided to make the additional purchases and before those purchases were actually completed.

fraud provisions. Stockholders are generally unaware of the necessary background information to judge the truth or falsity of the statements. Additionally, since the Act does not require the statements to be disseminated to shareholders, they do not have the immediate access of the issuer to the filings. Moreover, there may be instances where no shareholder has purchased or sold shares "in reliance" on the statements. In that event, even if the shareholders had standing, *cf. Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F.2d 540 (2d Cir. 1967) (non-selling shareholder given standing to seek injunctive relief), there would be little incentive to maintain an action.

IV.

Finally, we deal with Judge Pollack's dismissal of GAF's second claim, which asserted violations of section 10(b) and Rule 10b-5, on the ground that an issuer has no standing. Section 10(b) prohibits, *inter alia*, the use of any manipulative or deceptive device "in connection with the purchase or sale of any security." Although the rule of *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952) (only a purchaser or seller of a security can maintain an action under the section), may be subject to exception, *see, e.g., Mutual Shares Corp.* v. *Genesco, Inc., supra*, this Court has steadfastly refused to extend the reach of 10b-5 to give standing to an issuer.[24] *See, e.g., General Time Corp.* v. *Talley Industries,*

---

[24] In the recent and most authoritative case on section 10(b) and Rule 10b-5, *Superintendent of Insurance* v. *Bankers Life and Casualty Co.*, — U. S. —, — n. 10 (1971), the Court explicitly refused to express its views on whether an issuer has standing under section 10(b) and Rule 10b-5.

Inc., 403 F. 2d 159, 164-65 (2d Cir. 1968), *cert. denied*, 393 U. S. 1026 (1969).

Moreover, in this context as opposed to standing under section 13(d),[25] the implications of the enactment of section 14(e) making it illegal to make false or misleading statements "in connection with any tender offer," as distinguished from the "purchase or sale of any security," are somewhat clearer. We recognized in *Iroquois Industries, Inc.* v. *Syracuse China Corporation*, 417 F. 2d 963 (2d Cir. 1969), *cert. denied*, 399 U. S. 909 (1970), "[t]hat Congress enacted the new Section . . . is at least an indication that in tender offer contests such as that at bar there was no standing to sue under Rule 10b-5 by either the tender offeror or by the target corporation." This same reasoning is just as meaningful in the framework of section 13(d) and accordingly, we are chary of finding that GAF, based on the allegations before us, has standing under Rule 10b-5.

Since we have found that GAF has standing under section 13(d) to seek its remedy based on the alleged fraudulent statements in the Schedules,[26] we see no compelling reason to open the door to issuers to bring the broad range of fraud actions, in some instances, seeking more than "injunction" relief, which are cognizable under section 10(b). *See Bankers Life and Casualty Co.*,——U. S.—— (1971). We agree, however, with Judge Friendly's comment in *General Time* that "we would not wish to place our approval on a holding that under no circumstances

---

[25] *See* note 22 *supra*.

[26] If the district court should find that the Milsteins have violated section 13(d), it will be able to provide full and effective relief under its equity powers. Although stock manipulation (alleged as a violation of section 10(b)) is not *per se* a violation of section 13(d), GAF has alleged that the manipulation occurred in furtherance of the conspiracy and while the Milsteins were in violation of section 13(d).

can an issuer have standing to seek an injunction."[27] 403 F. 2d at 164.

In reversing that part of Judge Pollack's order which dismissed Claim I of GAF's complaint on the ground that it failed to state a claim on which relief could be granted, we emphasize that we are not yet called upon to determine whether the Milsteins have in fact violated section 13(d) or, if they have, what relief would be appropriate. That part of Judge Pollack's order dismissing Claim II of the complaint under section 10(b) is affirmed. Costs to the appellant.

---

[27]We do not foreclose the possibility, for example, that an issuer might have standing under 10b-5 to seek injunctive relief in circumstances where, despite the absence of a purchase or sale, it has suffered or will suffer direct injury because of the alleged fraud, or where it would be the most appropriate party to assert 10b-5 violations affecting all of its shareholders. The issuer, for example, may have standing to enjoin a manipulative scheme which had the effect of depressing the price of the issuer's stock immediately prior to a contemplated issue of securities, or it may have standing to enjoin a fraud whose purpose was to inflate the market value of the stock of a company with which the issuer was negotiating a merger. Moreover, there may be additional situations in which the standing of the issuer under 10b-5 will have to be appraised anew.

APPENDIX B

GAF CORPORATION,

Plaintiff,

v.

PAUL MILSTEIN, SEYMOUR MILSTEIN, GLORIA MILSTEIN FLANZER and MORRIS MILSTEIN,

Defendants.

No. 70 Civ. 5502.

United States District Court,
S. D. New York.
March 22, 1971.

[1063]* Winthrop, Stimson, Putnam & Roberts, New York City, for plaintiff by Edwin J. Wesely, and Richard A. Horgan, New York City, of counsel.

Stroock & Stroock & Lavan, New York City, for defendants; Louis Loss, Cambridge, Mass., David Sher, David Lubart, Charles G. Moerdler, Gerald D. Fischer, Stephen Block, New York City, of counsel.

POLLACK, District Judge.

The defendants have moved for a dismissal of the complaint pursuant to Fed. R. Civ. P. 12(b)(6)[1] on the ground

*Page references in brackets indicate pages in the official reporter.

[1]Or, in the alternative, summary judgment pursuant to Fed. R. Civ. P. 56.

that the first and second counts set forth in the complaint fail to state a claim upon which relief can be granted.

The two counts in the complaint respectively charge that the defendants constitute a group in violation of Sections 13(d) and 10(b) of the Securities and Exchange Act of 1934, as amended,[2] [1064] for failing timely to file a Schedule 13D[3] required by Section 13(d) and for making material misstatements and omissions in the Schedule 13D that they did eventually file.

The four defendants are related, three of them children of the fourth. They hold approximately 324,166 shares of GAF Corporation convertible preferred stock,[4] constituting 10.25% of the outstanding shares of that class. These shares were acquired as an outgrowth of the acquisition by GAF of the Ruberoid Company in 1967. At the time of the GAF-Ruberoid merger, defendants owned about 8% of Ruberoid's common stock while GAF owned 26%. As part of the merger, the GAF holdings in Ruberoid were cancelled and defendants' holdings automatically rose from approximately 8% (in Ruberoid) to slightly more than 10% (of GAF preferred) solely by reason of GAF's cancellation of its own holdings. Since obtaining their preferred shares in the merger proceed-

---

[2]15 U. S. C. § 78a et seq. For simplicity, it will be called the Exchange Act. Effective July 29, 1968, the Williams Bill amended the Exchange Act and enacted the statutes to be referred to herein. Pub. L. No. 90-439, 82 Stat. 454 (1968).

[3]The statute requires the Schedule 13D to be sent to the issuer and each Exchange where the securities in question are traded as well to be filed with the Securities and Exchange Commission. § 13(d)(1). For simplicity, this duty will be referred to as filing with the Commission.

[4]This figure excludes 28,808 trust shares as to which defendants disclaim beneficial ownership.

ings, the defendants have not acquired any additional shares of GAF preferred.

The only securities of GAF purchased by defendants since the merger are approximately 209,300 shares of common stock, a different class, or 1.6% of the total number of outstanding shares of that class. The total voting power of defendants in GAF (preferred and common vote together) approximates 4%.

Plaintiff alleges that defendants, acting in conspiracy, determined to take over GAF sometime after July 29, 1968, the effective date of the Williams Bill. The plaintiff claims that Section 13(d)[5] obligated defendants to file Schedule 13D within ten days after this group was formed. Instead, says plaintiff, the defendants failed to file Schedule 13D until September 24, 1970, which plaintiff says was untimely filing. (The defendants contend that they are not subject to Section 13(d) and that their filing of a Schedule 13D was purely voluntary). GAF additionally claims that the Schedule 13D that was filed, as well as amendments, contained *inter alia* deliberately false and misleading statements to conceal the take-over conspiracy and plans of the group.

The plaintiff contends that the violations have caused and continue to cause irreparable injury to GAF's shareholders and the investing public and such irreparable harm will continue unless defendants and others allegedly conspiring with them are enjoined from their unlawful activities.

In its prayer for relief, the plaintiff seeks both a preliminary and permanent injunction against the defendants preventing them from acquiring any shares of any class of GAF stock; soliciting any proxies to vote GAF stock; voting any shares of GAF stock acquired during the con-

[5]Sections cited herein refer to the Exchange Act, as amended.

spiracy; and otherwise acting in furtherance of the alleged conspiracy. This relief is requested to be operative until the effects of the alleged conspiracy have been fully dissipated and the alleged unlawful acts fully corrected.

The ultimate issue presented by the defendants' motion to dismiss the first count is whether, organizing a group of stockholders owning more than 10% of a class of equity securities with a view to seeking control is, without more, a reportable event under Section 13(d) of the Exchange Act; and as to the second count, whether in the absence of a connected purchase or sale of securities, the target corporation claiming vio- [1065] lation of Section 10 and Rule 10b(5)[6], has standing to seek an injunction against a control contestant for falsity in a Schedule 13D filing.

At the threshold, it is well to note that the congressional purpose of the Exchange Act was "to provide for regulation and control" of "transactions in securities" and "to insure the maintenance of fair and honest markets in such transactions." § 2.

I.

The Williams Bill was added to the Exchange Act on July 28, 1968. It had its genesis in the wave of cash tender offers that had become increasingly popular in the years immediately preceding enactment. There was an increasing use of the cash tender offer to acquire control of corporations. Existing legislation did not require disclosure to investors of facts concerning the offeror, and a need was felt to enact legislation which would require disclosure to shareholders not only by those making cash tender offers but also by substantial holders entering into

[6]17 C. F. R. § 240.10b-5.

the securities markets to acquire stock of a target company. Means were sought by Congress to help maintain honest securities markets and to insure that public investors have truthful information on which to make investment decisions.

Accordingly, the Williams Bill, effective July 29, 1968, required the filing of public information in response to prescribed questions, if, a tender offer for an equity security of a publicly held company would result in beneficial ownership of more than 10 percent[7] of the securities of that class. § 14(d)(1). In addition, with an exemption to be mentioned later, the Williams Bill required a similar report—even if no tender offer is made—by any person who after acquiring securities of the class is the beneficial owner of more than 10% of the class. § 13(d)(1). The public report must be made "within ten days after such acquisition." This requirement applies to persons who beneficially have owned more than 10% of a class before the acquisition of additional stock as well as to persons who become the beneficial owners of more than 10% of the class as a result of the acquisition. *See* SEC Release of August 30, 1968, CCH Fed. Sec.L.Rep. ¶ 77,597; Release of January 18, 1971, CCH Fed.Sec.L.Rep. ¶ 77,946. When the purpose of such a person's "prospective purchases" is to gain control, he must disclose his "plans" to liquidate, merge, or make any other major change in the target company's business or structure. § 13(d)(1)(C). Moreover, under Schedule 13D, such a person must disclose, in any event, just what the "purpose or purposes of the purchase or proposed purchase of securities of the

[7]Now 5% pursuant to Pub. L. No. 91-567, 84 Stat. 1497 (1970). During the relevant period the operative figure was 10%, which will be used below unless otherwise noted.

issuer" is.[8] The schedule covers past, prospective and proposed purchases.

(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title * * *, is directly or indirectly the beneficial owner of more than 10 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe * *.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Com-[1066]mission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(5) The provisions of this subsection shall not apply to

[8] 17 C. F. R. § 240.13d-101, Item 4.

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class.

The statute is clearly designed to treat persons acting in concert as if the group were an individual. The sponsor, Senator Williams, explained the reason for this in introducing the bill:

> This definition would successfully close the loophole that now exists which allows a syndicate, where no member owns more than 10 percent, to escape the reporting requirements of the Securities Exchange Act. 113 Cong. Rec. S445 (daily ed. Jan. 18, 1967).

On its face Section 13(d)(1) clearly does not apply, in respect of an individual, in the absence of an acquisition of securities subsequent to the enactment of that law. The statute says that "any person who, *after acquiring* * * * ownership of any equity security of a class * * * is * * * the * * * owner of more than 10 per centum of such class shall, * *" (emphasis added). However, if the purchases are of less than 2% of the shares of a class within a 12 month period, they are exempt and do not create a reportable event. § 13(d)(5)(B).

The plaintiff forcefully urges, however, that a group should be treated differently from an individual and that if a group is organized with a view to control, it must report if its holdings of a class are more than 10% of the outstanding shares even though no one in the group makes any purchases after the creation of the group. Statutory authority for such a position is thought to be found in

Section 13(d)(3) which treats a group as an individual. From there, plaintiff claims that a constructive conveyance of the shares from the individual to the group occurs and results in an "acquisition" when the group is formed, thus allegedly complying with the language of *after acquiring* in Section 13(d)(1).

The statute does not define "acquisition" (other than to exempt 2% of the class from the requisite acquisition) nor does it unequivocally state that the words "after acquiring" are to be understood to refer only to acquisitions taking place after the effective date of the Williams Bill. Moreover, both Houses of Congress expressly stated that the group would be deemed to have become beneficial owners of the shares held by its individual members and that a filing would consequently be required upon formation of the group, whether or not any member of the group had acquired securities at that time. Each committee report stated as follows:

> [Section 13(d)(3)] would prevent a group of persons who seek to pool their voting or other interests in the securities of an issuer from evading the provisions of the statute because no one individual owns more than 10 percent of the securities. The group would be deemed to have become the beneficial owner, directly or indirectly, of more than 10 percent of a class of securities at the time they agreed to act in concert. Consequently, the group would be required to file the in- [1067] formation called for in section 13(d)(1) within 10 days after they agree to act together, whether or not any member of the group had acquired any securities at that time. This provision is designed to obtain full disclosure of the identity of any person or group obtaining the benefits of ownership of securities

by reason of any contract, understanding, relationship, agreement or other arrangement. S. Rep. No. 550, 90th Cong., 1st Sess. 8 (1967); H. R. Rep. No. 1711, 90th Cong., 2d Sess. 8-9 (1968).

It is easy to see how the strong language in the committee reports gives a superficial acceptance to plaintiff's view that a filing is necessary upon formation of a group, without purchases. In fact, Professor Loss, a leading text writer in the securities area reported the statute in the terms of these congressional reports in his 1969 supplement:

> So far as both new filing provisions—§§ 13(d) and 14(d)—are concerned, a "class" consists of all the outstanding securities of the class exclusive of any held by or for the issuer or a subsidiary. §§ 13(d)(4), 14(d)(3); cf. Rule 16a-2(a), supra p. 3058. Again, two or more persons acting as a partnership "or other group" for the purpose of acquiring, holding or disposing of securities are considered a "person." §§ 13(d)(3); 14(d)(2). Any such group is considered to become the beneficial owner of more than 10 percent at the time its members agree to act in concert. Cf. pp. 705-06 supra (Sec. Act Rule 154(b)); pp. 1101-04 supra (Sec. Ex. Act § 16(a)). Consequently, the group must file the information specified in § 13(d)(1) within ten days after its members agree to act together, whether or not any member has acquired any security at that time. 6 Loss, Securities Regulation 3664 (Supp. 1969).

Professor Loss has appeared herein as co-counsel for the defendants and has advised the Court that it is his present view that the reports do not appropriately reflect the law as enacted.

Appendix B

Legislative reports do not take precedence over clear statutory language; and any inquiry must "begin with the language of the statute itself." Jones v. Alfred H. Mayer Co., 392 U. S. 409, 420, 88 S. Ct. 2186, 2193, 20 L. Ed. 2d 1189, 1197 (1968). "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." United States v. American Trucking Ass'ns., Inc., 310 U. S. 534, 543, 60 S. Ct. 1059, 1063, 84 L. Ed. 1345, 1350-1351 (1940); Movielab, Inc. v. Berkey Photo, Inc., 321 F. Supp. 806 (S. D. N. Y. 1970) (Mansfield, J.).

Legislative history is extremely useful for interpreting a statute when the Act's language is ambiguous. However, the legislative reports should not be resorted to here since the specific statutory language is clear and compels the construction that the reportable event is the acquisition of the requisite amount of shares and not the mere formation of a group with a view to control. The Supreme Court has said:

> Legislative materials may be without probative value, or contradictory, or ambiguous, * * * and in such cases will not be permitted to control the customary meaning of words * * or construction found by experience to be workable. United States v. Dickenson, 310 U. S. 554, 562, 60 S. Ct. 1034, 1038, 84 L. Ed. 1356, 1362 (1940).

This is such a case in which the reports of Congress are at odds with the statute as it was enacted. In these circumstances, the words of the enactment control over the inconsistent explanation of those who described the statute.

It is not for the Court to speculate how or why the inconsistent congressional reports were made; the function of the Court is to administer the law as written by the Congress. The words of a statute are designed to give notice

to the public and if the public is told that words do not mean what they say because of committee reports which are inconsistent, the public will have no way of insuring compliance with congression- [1068] al dictates—if only because the public will have no idea which dictate to follow. In short, we do not legislate by committee report, we legislate by statute.

Not only does the statute require an acquisition before there need be a filing, but the language of Section 13(d)(3) indicates that groups are not to be treated differently from individuals.[9] It says:

> When two or more persons act as a partnership * * * or other group for the purpose of acquiring, holding, or disposing of securities * * *, such * * * group shall be deemed a "person" for the purposes of this subsection.

The statute was clearly intended to prevent persons acting in concert from concealing information important for investor protection by making transactions as individuals. But if a group is "deemed a 'person' ", then a group need not do what an individual does not have to do.

Throughout our law we have statutes which make group action more "reprehensible" than individual action. A criminal conspiracy may occur when the same acts, if done by an individual, would not constitute a substantive crime because society has greater difficulty defending against con-

---

[9]Individuals who acquire their shares after the effective date of the Act will, of course, have to file. Therefore, the number of individuals holding their shares prior to enactment and thereby avoid filing will decline over time. Conceivably, a distinction can be drawn between groups whose members acquired shares prior to the effective date and those whose members acquired shares later, with groups whose members acquired no shares after July 29, 1968 not having to file since they are to be treated like individuals. However, this decision does not rest upon such a distinction.

certed action. *E. g.*, United States v. Hutto, 256 U. S. 524, 41 S. Ct. 541, 65 L. Ed. 1073 (1921); United States v. Wiesner, 216 F. 2d 739 (2d Cir. 1954). Similarly, restraints of trade may be more harmful if committed by two or more parties acting together than if done by one person. Sherman Act §§ 1, 2, 15 U. S. C. §§ 1, 2. But in the context of tender offers and corporate takeovers, the number of people involved is unimportant compared to the financial resources available to the insurgents. A person of large financial resources can be a far greater threat to entrenched management than an entire family of substantially lesser means. It is money and not numbers that counts here.

GAF would force a group to file when it is created, yet when the group later purchases less than 2% of the outstanding shares of a class in a twelve month period, it need not amend its filing because of the exemption in Section 13(d)(5)(B). Conceivably, Congress may have felt that a first filing—when the group is formed—is more important to the public than later filings when a small amount of stock is purchased, but nowhere is it indicated that the legislators felt one filing is more significant than another. There is simply no statutory authority for saying that a group or an individual's purchase of not more than 2% is exempt, but a group must report when it makes no purchases at all.

Nowhere does the statute say that the formation of a group with a view to gaining control but without making any purchases of securities, triggers the filing requirement. That result cannot be achieved by attributing ownership of the members to the group, without any other purchase.

As was pointed out above, it is not for this Court to decide this case on the basis of what was best for Congress to do, but rather only on the basis of what Congress did.

Appendix B

The inherent difficulty of ascertaining when a group was formed is akin to an attempt to grasp quicksilver. In all probability, the usual case would present a continuous unfolding stream of events leading to the group's determination to attempt a take-over. At what stage then would Section 13(d) require a filing? In the instant litigation, for [1069] for example, all four defendants are close relatives and it is conceivable that the alleged conspiratorial agreement began as complaints voiced during a dinner or other family gatherings. These may have included or been followed by utterances against GAF management and the erosion of the investment value of defendants' stock interests. Yet, if it is determined later to read these complaints as the establishment of a group with intent to act, and the group has not filed timely, it is left open to a sweeping injunction as has been requested here.

A legal controversy to determine the birth date of the group, in the absence of trading in securities, is of no especial value to the maintenance of fair and honest markets. In contrast, the requirement to file, when the group has invaded the securities markets and acquired shares in excess of the 2% exemption, supplies a perfectly clear, reportable event keyed to the objects of the securities laws.

Plaintiff also calls attention to the language of Section 13(d)(3) defining a person as including a group formed "for the purpose of acquiring, *holding or disposing of* securities." (emphasis added.) If a filing is necessary only after acquiring securities, § 13(d)(1), then, according to plaintiff, *holding or disposing* has no meaning. To give effect to those words, plaintiff wiuld require a group formed to hold securities—as defendants are alleged to have done here—to file. These words may have meaning in other contexts, but they certainly do not apply here. Section 13(d)(1) does not fix the filing date as the date when a group

is said to become a holder or a seller of securities; it establishes acquisition as the reportable event.

An examination of the regulatory scheme of the Exchange Act indicates that the interpretation of the statute to require a non-exempt acquisition as the reportable event, is fully consistent with the statutory scheme found in Sections 13, 14 and 16 of the Exchange Act. As previously noted, the goals of the federal securities statutes are to provide freely and fairly functioning markets.

Each corporation whose shares are traded on a national securities exchange or otherwise registered with the Commission must file periodic reports with the Commission (which are available to the public). These reports, which must be filed monthly in some instances, are designed to keep investors apprised of material current events in companies whose stock is traded or held by a significant number of people. § 13(a); 17 C. F. R. § 240.13a-11(a).

Similarly, proxies to vote the shares of such companies cannot be solicited by either management or insurgents without furnishing the stockholder with material information. § 14(a); 17 C. F. R. § 240.14a-3. These informational requirements cannot be avoided by management's failure to solicit proxies. § 14(c).

Prior to the passage of the Williams Bill, the investor protections given in proxy fights were missing when takeovers occurred by tender offers in which a "loser" could still frequently sell his holdings for a profit after the battle. *E. g.*, Crane Co. v. Westinghouse Air Brake Co., 419 F. 2d 787, 791 (2d Cir. 1969), cert. denied, 400 U. S. 822, 91 S. Ct. 41, 27 L. Ed. 2d 50 (1970). Part of the Williams Bill, Section 14(d)(1) gives substantial investor protection by requiring disclosure of information directly to shareholders as well as to the Commission prior to *or* simultaneously with the tender offer. The statute could have re-

quired filing in advance of the initiation of the tender offer.[10] But to do so, it was thought by some, would have given entrenched management an unwarranted advantage in a struggle for corporate control.

There are those among the experts and commentators who considered tender offers and stock acquisitions in pursuit [1070] of control as a healthy process. Corporate Acquisitions by Tender Offer, 115 U. Pa. L. Rev. 317, 321-22, 360-71 (1967); A Note on Chilling Tender Solicitations, 21 Rutgers L. Rev. 309 (1966-67); Mergers and the Market for Corporate Control, 73 J. Pol. Econ. 110, 113 (1965). While management and its supporters cogently argued that managements need protection against the corporate raider, see Comment, Senate Bill 510 and the Cash Tender Offer, 14 Wayne L. Rev. 568, 585-86 (1968), the Williams Bill concentrated on an investor protection goal rather than on providing protection for management's ability to repel raiders.

Section 14(d), as it was enacted, gave no information to investors prior to the tender offer even though it was recognized that there could be occasions in which investors should have information prior to the tender offer. Section 13(d) filled the gap somewhat—it supplements Section 14(d) by requiring the public report of purchases of stock which exceed a prescribed minimum, 2% of the class, and result in holdings of 10% or more of the class—regardless of whether the acquisitions are followed by a tender offer or proxy contest.

The 2% exemption provided in Section 13(d)(5)(B) recognizes that such small purchases do not alter substantially the equilibrium between supply and demand and

---

[10] *See* S. 2731, 89th Cong., 1st Session (1965) (forerunner of the Williams Bill, requiring filing 20 days in advance of initiating a tender offer).

therefore the market price of the stock in question. It is significant that the exemption is phrased not in terms of the total values of purchases but in percentage terms, indicating that it is the relative effect of the purchases to the total shares outstanding that is important.[11] The inapplicability of the 2% exemption to sales indicates that Congress felt that sales at crucial times may be even more important than purchases when a tender offer is made, and therefore the holder must report any material change in his holdings caused by disposing of securities. § 13(d)(2).

Similarly, a constructive "conveyance" from individuals to the group, by aggregating the holdings of a group, by itself does not affect the equilibrium between supply and demand and therefore cannot affect market values. The basic protection of Section 13(d) is to indicate who is behind large holdings that are created or supplemented by market trading, *cf.* Crane Co. v. Westinghouse, *supra* at 792-793, and showing the cause of various price movements is not needed when there have been *neither* open market purchases *nor* any tender offer. Requiring a group to file in such a situation, as plaintiff argues should be the case, is superfluous in the context of the Williams Bill's goals, if not counter to them altogether.

The Court realizes that holders of more than 10% of any class of securities must also register under Section 16(a). However, the purpose and operation of Section 16 are different from Section 13(d). Section 16 insures that officers, directors, and large shareholders—the people most likely to have access to "inside" information—cannot use their positions to trade in securities to the disadvantage of

---

[11]Compliance with registration and filing requirements in the securities laws is grounded on both absolute and relative terms. *E.g.*, § 12(g)(1) of the Exchange Act; Rule 154(b) promulgated under the Securities Act of 1933, 17 C. F. R. § 230.154(b).

the public and the corporation. This goal is achieved by requiring disgorging of any profits earned through short term holdings of the securities in question. § 16(b). To effectuate this disgorging of profits, filings must be made with the Commission whenever there is a change in holdings by those covered by Section 16(a). However, Section 16(a) requires the disclosure of changes in holdings within ten days of the close of a calendar month in which the changes take place. This means that in a quickly moving tender offer situation, transactions taking place at the beginning of a month need not be reported under Section 16(a) un- [1071] til forty days later—when the result of the tender offer is history. In contrast, Section 13(d)(2) requires disclosure of material changes in the facts set forth in filed statements as soon thereafter as the Commission requires by rule or regulation. The Commission's regulation in respect to any material change requires amendments to be "promptly file[d]" after the change occurs. Rule 13d-2, 17 C. F. R. § 240.13d-2.

The difference in the coverage and purposes between Section 13(d) and 16(a) are highlighted by the recent amendment to Section 13(d)(1), not applicable to this litigation, reducing the holdings now required to be reported from 10% to 5%. Pub. L. No. 91-567 (1970).

Reporting changes in holdings is also important in an attempted take-over by proxy fight if one contestant claims another has effected changes in stock prices.[12]

---

[12]The Court notices that the letter sent by GAF's Board of Directors to shareholders on March 2, 1971 said inter alia: "[T]he Milsteins could not care less if GAF stock went *down* since they would then *'buy, buy, buy'*." While the defendant Milstein family has not had the substantial number of transactions required to trigger § 13(d)(1)'s reporting requirement, it is conceivable that substantial transactions, if disclosed, could explain price movements argued about in proxy fights. In another context, counsel for defendants said in oral argument that management should equally be required to disclose important information during a take-over fight.

Appendix B

The only reported Court determination closely in point to the instant problem is Bath Industries, Inc. v. Blot, 427 F. 2d 97 (7th Cir. 1970). The language of the Seventh Circuit opinion makes it seem that the Court determined that a group would have to file when there is an agreement to acquire shares:

> [I]t is our conclusion that the Act should be interpreted to require compliance with its disclosure provisions when, but only when, any group of stockholders owning more than 10% of the outstanding shares of the corporation agree to act in concert *to acquire additional shares*. 427 F. 2d at 109 (emphasis in original)

The Seventh Circuit itself recognized that the 2% exemption should be read into that statement. 427 F. 2d at 111 n. 7.

The actual facts in the record of *Bath* were that no filing was made until after the litigation began; the group involved held in excess of 50% of the voting power; after the group was formed purchases in excess of the exempt limit were in fact made of securities of the applicable class; the Court mentioned that the statute required compliance within 10 days of the purchases; and the Court's mention in footnote 7 of the 2% exemption showed its actual reliance on purchases and not the mere organization of a group. Consequently, *Bath* must be read in the context of the facts there under adjudication; and the language used in the opinion presumably was not intended as an adjudication outside the situation presented.

Unlike the apparent situation in *Bath*, the Milstein family has bought but 1.6% of the outstanding shares of common stock *since the enactment of Section 13(d)* and those shares are not even in the class of convertible pre-

ferred of which the defendants own more than 10%. Even under a broader interpretation of *Bath* than is warranted by its facts, the Milsteins need not have filed.

Congress clearly knew how to require holders to file without making any acquisitions. It did so in Section 16(a), but different language was used in Section 13(d)(1). As interpreted here, the Williams Bill *does* "close the loophole * * * which allows a syndicate, where no member owns more than 10% to escape the reporting requirement of the Securities Exchange Act." 113 Cong. Rec. S445 (daily ed. Jan. 18, 1967). A group can avoid filing under Section 13(d)(1) *only if* it acquires no significant amount of securities after its creation. If there are no purchases after the creation of the group, there can be *no* take- [1072] over absent a proxy fight, where disclosure is guaranteed by Section 14(a) and the rules promulgated thereunder. If the purchases are made pursuant to a tender offer, there will be, of course, a filing under Section 14(d).

II.

Turning now to GAF's claim that even if the Milsteins did not have to make a filing under Section 13(d)(1), the schedule that was filed was false and misleading and therefore in violation of Section 10(b) and Rule 10b 5 promulgated thereunder. Defendants move to dismiss this count on the ground that GAF has no standing because it is neither a purchaser nor a seller of shares in question and therefore does not come under the operative language of Rule 10b-5, "in connection with the purchase or sale of any security." *E. g.*, Iroquois Industries, Inc. v. Syracuse China Corp., 417 F. 2d 963 (2d Cir. 1969), cert. denied, 399 U. S. 909, 90 S. Ct. 2199, 26 L. Ed. 2d 561 (1970); Birnbaum v. New-

port Steel Corp, 193 F. 2d 461 (2d Cir.), cert. denied, 343 U. S. 956, 72 S. Ct. 1051, 96 L. Ed. 1356 (1952).

GAF answers that the complaint seeks only injunctive relief and that the purchaser-seller limitations of *Birnbaum* and its progeny apply only to actions at law. *E. g.*, Mutual Shares Corp. v. Genesco, Inc., 384 F. 2d 540 (2d Cir. 1967); Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc., 307 F. Supp. 910 (S. D. N. Y. 1969) (Cannella, J.), aff'd on other grounds, 425 F. 2d 842 (2d Cir. 1970); Christophides v. Porco, 289 F. Supp. 403, 406 (S. D. N. Y. 1968) (Pollack, J.); Marino v. Coburn Corp., CCH Fed. Sec. L. Rep. ¶ 92,959 (E. D. N. Y. 1971) (Dooling, J.),

Plaintiff says it is logical for a corporation to seek private enforcement of the Commission's rules and regulations when there are violations involving its own shareholders. J. I. Case Co. v. Borak, 377 U. S. 426, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964); Electronic Specialty Co. v. International Controls Corp., 409 F. 2d 937 (2d Cir. 1969).

However, this is not a case in which an issuer is a disinterested party protecting merely the markets and its shareholders from fraudulent acts. There is an admitted fight for control of plaintiff between the defendants and entrenched management. A clear self-interest on the part of the moving parties takes such a controversy beyond the rationale which explains the corporation's vicarious standing to sue for an injunction, viz., an additional means of disinterested protection of the market place and of the stockholders' best interests. As the Court of Appeals noted in General Time Corp. v. Talley Industries, Inc., 403 F. 2d 159, 164 (2d Cir. 1968), cert. denied, 393 U. S. 1026, 89 S. Ct. 631, 21 L. Ed. 2d 570 (1969):

Appendix B

> There are many practical advantages * * * in allowing a corporation in certain cases to enjoin manipulation of its stock, although courts must act both with speed and with caution lest such action become vehicles for management to thwart purchases in the true interest of the stockholder.

Even if an issuer would otherwise be accorded standing to sue under Rule 10b-5, when management control as well as the integrity of the markets are sought to be conserved at the same time by the same prime movers, the conflicting interests dictate that the embattled management should not use the equitable assistance afforded by injunction to insure fair and free markets. It is generally inappropriate to impede a legitimate fight for the control of the management of a corporation. Where the corporate management faces a conflict of interest, and no direct connected interest of the corporation is to be vindicated by the suit, the protection of the objects of Rule 10b-5 through equitable intervention is better left to be administered by the federal administrative agency, the SEC, or other eligible complainants.

It is always possible that management will phrase a complaint in terms that indicate no control fight, to obtain standing under Rule 10b-5 if the corporation is otherwise to be granted standing. On [1073] the other hand, defendants may try to avoid liability by insisting they are involved in a fight for control. In such a situation, it may be appropriate to allow the case to go to an evidentiary hearing to determine the true motivations of the parties. However, where the record is clear that there is a control fight, as the parties here concede, no hearing is needed to invoke the therapeutic rule that a conflict of interest will

not be sanctioned by according to the management a standing to sue under Rule 10b-5 where the corporation's own interests are not at stake.

Another approach to the problem herein yields the same result. By including Section 14(e) in the Williams Bill, Congress indicated that "in respect to tender offers * * * there was no standing to sue under Rule 10b-5 by either the tender offeror or by the target corporation." Iroquois Industries, Inc. v. Syracuse China Corp., 417 F. 2d 963, 969 (2d Cir. 1969), cert. denied, 399 U. S. 909, 90 S. Ct. 2199, 26 L. Ed. 2d 561 (1970). Section 14(e) was only a codification of existing case law under Rule 10b-5 *"except perhaps for any bearing it may have on the issue of standing."* Electronic Specialty Co. v. International Controls Corp., 409 F. 2d 937, 940 (2d Cir. 1969) (emphasis added).

The target corporation has standing under Section 14(e) if there are "* * * any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation." § 14(e); Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc., 425 F. 2d 842, 843 n. 1 (2d Cir. 1970); Electronic Specialty Co. v. International Controls Corp., 409 F. 2d 937, 946 (2d Cir. 1969). The language does not cover fraudulent misstatements in a Section 13(d) filing when there is no tender offer. Levine v. Seilon, Inc., 69 Civ. 209 (S. D. N. Y. 1969) (McLean, J.), aff'd on other grounds, 439 F. 2d 328 (2d Cir. 1971).

Congress enacted Sections 13(d), 14(d), and 14(e) at the same time. The standing accorded the target company in connection with Section 14(d), but lacking under Rule

10b-5, could easily have been extended to Section 13(d). The filing made under Section 14(d) even contains "the information specified in section 13(d)." § 14(d)(1). However, Congress chose not to extend the target company's standing to complain under the securities laws when, as here, no tender is ever made.

Nothing stated herein is intended to express any opinion on the merits of the claims asserted in the second count.

The complaint is dismissed.

So ordered.

APPENDIX C

STATUTORY PROVISIONS INVOLVED

Section 13(d) of the Securities Exchange Act of 1934, 15 U. S. C. § 78m(d):

(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 10 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the

parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

* * *

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for protection of investors.

* * *

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

* * *

(5) The provisions of this subsection shall not apply to—

Appendix C

* * *

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

* * *

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.